

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 123
5573019

BETWEEN BEHNAM SOLTANI
Applicant

AND MAKING FUTURES HAPPEN
INTERNATIONAL INSTITUTE
LIMITED
Respondent

Member of Authority: M B Loftus

Representatives: Behnam Soltani, on own behalf
Carey Teng, for Respondent

Investigation Meeting: 5 July 2016 at Wellington

Submissions Received: At the investigation meeting

Determination: 5 October 2016

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] The applicant, Behnam Soltani, claims the respondent, Making Futures Happen International Institute Limited (MFH) has *violated his employee rights* by failing to provide a written employment agreement or pay tax and ACC on his behalf.

[2] MFH says it engaged Mr Soltani as a contractor and not as an employee. It says it was not therefore required to provide an employment agreement and Mr Soltani was responsible for making his own arrangements regarding tax and ACC.

Background

[3] Mr Soltani was engaged by MFH as a relieving tutor on English as a Second Language courses it provided. He did so over two periods – the first being between January and June 2013 and the second between July 2014 and March 2015.

[4] Mr Soltani says it was not till after he ceased he became aware no tax had been forwarded to the Inland Revenue and nor had ACC levies been paid. This led to problems with the Inland Revenue which has sent various accounts to Mr Soltani. These include late payment penalties.

[5] Mr Soltani considers that as he was an employee MFH failed to comply with the obligation it deduct and forward PAYE and ACC payments. He asks MFH rectify the issue by making the requisite payments. He also challenges the lack of an employment agreement which, he says, he frequently requested.

[6] MFH denies it is responsible. It says Mr Soltani was never employed but engaged as a contractor. Tax and ACC was therefore his responsibility and it has rejected his requests. It denies Mr Soltani ever requested an employment agreement.

[7] Finally I think it proper to note MFH considered Mr Soltani a very good tutor who provided an exemplary service to its students. This dispute is limited to his status when providing those services.

Determination

[8] The first question to be determined is whether or not Mr Soltani was an employee. If not the Authority has no jurisdiction to deal with his claims.

[9] If however Mr Soltani was an employee then MFH's admission there is no written employment agreement means it failed to provide one as required by s 65(1)(a) of the Employment Relations Act 2000 (the Act). It also follows MFH failed to deduct and forward PAYE as it is required to do¹ though that raises subsequent questions. They are where does the tax liability fall² and if not with MFH whether it has disadvantaged Mr Soltani in some way?³

¹ Sections RA 5(1)(a), RD 2(2) and RD 3(1)(a)(i) of the Income Tax Act 2007

² Section RD 4(2) of the Income Tax Act 2007

³ Section 122 of the Employment Relations Act 2000

[10] Section 6 of the Act provides the meaning of employee. The material provisions state:

*(1) In this Act, unless the context otherwise requires, **employee** —
(a) means any person of any age employed by an employer to do work for hire or reward under a contract of service; ...*

(2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.

*(3) For the purposes of subsection (2), the court or the Authority —
(a) must consider all relevant matters, not including any matters that indicate the intention of a person; and
(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship*

[11] In *Bryson v Three Foot Six Limited (No.2)*⁴ the Supreme Court stated, amongst other things, what *all relevant matters* in s 6(3)(a) of the Act means. It said:

“All relevant matters” certainly include the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship. They will also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. It is important that the Court or the Authority should consider the way in which the parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. “All relevant matters” equally clearly require the Court or Authority to have regard to features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test) which were important determinants of the relationship at common law...

[12] In this case I will need to consider the following in order to determine the nature of the relationship:

- a. What was the intention of the parties;
- b. Was there anything in writing to indicate the terms of the relationship between the parties;
- c. How did the relationship operate in practice;

⁴ [2005] ERNZ 372

- d. Were there features of integration and control in the relationship; and
- e. Was Mr Soltani effectively working on his own account?

What was the intention of the parties?

[13] Given the evidence I conclude there was never a meeting of the minds over the question of Mr Soltani's status – employee or contractor.

[14] Ms Teng accepts she played no part in his engagement and cannot say what was said. Nor, with subsequent changes in personnel, can she get evidence from those who were.

[15] Mr Soltani says he responded to an advertisement on a notice board at Victoria University where he was a student. It made no mention of status and he says the issue was never discussed. Indeed he says the issue never crossed his mind and he simply thought it would be like other tutoring roles he had with both the University and NZLC, another private provider. He does however add he would not have taken the role if he thought he was anything other than an employee but contradicted that by saying he would do any appropriate work to get the money he felt he needed.

[16] Opposing that MFH says it engages both employees and contractors and evidenced agreements relevant to both approaches. It says it normally formalises the arrangement via the appropriate written agreement though one signed by Mr Soltani cannot be found. That is perhaps not a surprise as he says he never had one.

[17] Suffice to say MFH is adamant its employed tutors are full time (though there was an exception engaged in an administrative role) and had to be available when required. It says these are its senior staff and all new starts commence as contractors engaged on an *as and when required* basis with fluctuating hours dependent on what is often seasonal demand and who can accept or reject assignments as they choose.

[18] The contractor's agreement expressly states the contractor is exactly that, there is nothing intended to create an employment relationship and the contractor is responsible for his or her own tax arrangements.

[19] The evidence would lead to a conclusion the parties had no mutual intent. MFH appears to have simply assumed it was doing what it normally did –engaging a

new start as a contractor while Mr Soltani never turned his mind to the issue or sought clarification.

Was there anything in writing to indicate the nature of the relationship?

[20] As already said there was no signed contract or agreement between MFH and Mr Soltani. There were, however, other documents which indicate Mr Soltani was a contractor. He regularly completed a form headed *MFH independent service contractor working hour record*. In it he recorded his hours and then sought payment via what is entitled an *Invoice to: Making Futures Happen International Institute*.

[21] Mr Soltani accepts he used these forms but found it difficult to answer questions about why or at least why he did not question the forms and their content.

How did the relationship operate in practice?

[22] Mr Soltani duties were those of a tutor and in that sense similar to those of others whether they be engaged as employees or contractors. That said, and while he made a lot of being required to attend planning meetings he ultimately accepted MFH's view he received invites to do so but there were no repercussions should he not as there would have been for employees.

[23] Notwithstanding a claim Mr Soltani was disadvantaged in a payment sense vis-à-vis employed tutors the evidence is this was not the case. All tutors, whether contractors or employees, were paid the same gross hourly rate for performing the same or similar functions. The only difference is Mr Soltani received the amount in full given MFH's belief he was a contractor responsible for his own tax while an employed tutor would have received the amount minus PAYE.

[24] The evidence is also that while employed tutors were predominantly full time and had set hours Mr Soltani's hours varied and this is reflected in the invoices he sent MFH. He was only called upon when required and then had the ability, as he accepts he had, to refuse work assignments if he so choose though he rarely did as he needed the income. He could also, as he once had occasion to do, arrange a replacement tutor.

[25] Finally I note Mr Soltani was, primarily, a university student. That was his first calling and that around which he arranged his activities. MFH's needs were secondary and that would not normally be the case were he an employee.

Control and integration

[26] The evidence leads to a conclusion MFH exercised little control over Mr Soltani and the way he worked. As already said he had the ability to pick and choose when he worked. He also had the freedom to design his own curriculum and teach as he saw fit. In the words of MFH he *had control over course delivery, methodology, teaching material, student progression and achievement monitoring* and he accepts that to be so.

[27] There is then the issue of tools and equipment required for the role. While these are limited I have just noted Mr Soltani designed his own curriculum and teaching materials. It is also Mr Soltani's evidence he had to provide an essential tool – a computer. Indeed he expressed some dissatisfaction about this.

[28] It is difficult to conclude Mr Soltani was an integral part of the business. While his duties were similar to those of an employed tutor he had a level of freedom they did not enjoy. MFH would continue to function without his services and as already noted MFH was not Mr Soltani's primary concern – his studies were.

[29] I find the factors under these tests weigh more in favour of a contracting relationship as opposed to one of employment.

Fundamental or economic reality test

[30] This test requires a consideration of whether Mr Soltani was effectively working on his own account.

[31] Mr Soltani did not pay tax and neither was it withheld by MFH. Similarly he was not GST registered but given the confusion already referred to when discussing intent this does not assist.

[32] However there is, as already said, the fact Mr Soltani accepts he could refuse work assignments if he so choose and could also arrange his own replacement. These are not things an employee can do.

[33] Similarly Mr Soltani accepts he could freely work for others and this included an ability to work for a direct competitor to MFH. Again this is not an ability an employee would normally have.

[34] When I consider these factors I conclude they indicate Mr Soltani had the freedom one would expect of someone in business on his own account.

Industry Practice

[35] I have no evidence that assists me reach a conclusion in this regard.

Conclusion

[36] While the parties reached no common position and had no contract or agreement to confirm the nature of the relationship those indicators there are point toward a contracting arrangement as claimed by MFH.

[37] The few documents that did exist expressly say so (the contractor working hour record and invoices). The relationship worked in a way that saw Mr Soltani granted freedoms an employee would rarely enjoy and there was little control.

[38] As already said the indicators point toward a contracting relationship and that, I conclude, was what Mr Soltani was.

[39] This conclusion means I do not have jurisdiction to consider his claims and accordingly they are dismissed.

Costs

[40] It is normal that costs follow the event but MFH was represented by one of its officers. There are no recoverable costs I am aware of so in order to avoid additional effort or expense for the parties, and given that a costs award can be reviewed, I choose to dispose of the issue and order costs lie where they fall.